

ISSN 0973-7480

Annual Subscription Rs. 1,200/-

**ORIENT**  
**JOURNAL OF LAW AND**  
**SOCIAL SCIENCES**  
(A MONTHLY JOURNAL)

VOLUME - V, ISSUE - 2

**JANUARY 2011**

Edited, Printed and Published by  
**Dr. A. M. ABDUL RUB**

Owned by  
**Dr. ABDUL RAYEES KHAN**

From  
**R. K. PRINTING PRESS AND PUBLICATIONS CENTRE**  
# 12-13-103, Street No. 3, Tarnaka, Secunderabad - 500 017.  
Andhra Pradesh - INDIA

## PRINCIPLES OF LEGISLATIVE DRAFTING: A STUDY

By

**Dr. Mukund Sarda\***

1. On the principles of drafting itself, Bentham's work may be said to be the starting point from which the modern theory of legislative drafting is derived.<sup>1</sup> Legislative drafting is a difficult art.<sup>2</sup> This relates to the expression of others ideas, in concise and clear language and the difficulties inherent in expressing them. A good draft requires the following essential requisites:-

- (i) It must be done by a person having the basic legal knowledge:
- (ii) Proper use of English language or the language in which the legislation is drafted, as is the case with Indian drafts being translated in Hindi or other local language of the State;<sup>3</sup>
- (iii) Ability and competence of the draftsman combined with imagination and plenty off practice in doing this work.

This follows that a lawyer without practical experience cannot take up the work of legislative drafting. In order to enable the lawyers to take up this work, it is very necessary to train them, as the work f legislative drafting very much differs from legal writing.<sup>4</sup> A mere knowledge of legal writing is totally inadequate, unless one knows the legislative drafting.

2. Legislative drafting has been described as both an 'art' and 'profession'.<sup>5</sup> Sir James Stephen<sup>6</sup> narrated his experience in the following words:

"With regard to any work that I have done, I have always found it full of mistakes and when they have been pointed out to me by some other person, I have considered I was under the same weight of obligation to him, as one s to a dentist. It is not very pleasant, when you are about it."

It is therefore, absolutely necessary that the Legislative drafting be referred to several others in order that the errors be known and corrected or at east to one independent critic. Knowledgeable criticism can be a long way in improving the drafts.

\* Principal & Dean, New Law College, Bhartiya Vidya Peet University, Pune.

<sup>1</sup> Ilbert, "Mechanics of law-making" campentri lectures, Columbia University, Press p. 94. (1914).

<sup>2</sup> Hiranani, "legislative drafting: An Indian view" the Modern Law Review Vol. 27 NO. 1 at 1-2 ((1964).

<sup>3</sup> The Central Legislation drafting s invariably translated; n Hindi and State drafts in Telugu as n Andhra Pradesh.

<sup>4</sup> Florence Dollo, "Tax legislation and the lawyers training needs – An African Perspective". Document series dated 24-10-2006.

<sup>5</sup> Viswanathan, T.K. "legislative drafting – shaping the law for the New Millennium", Indian Law Institute p. 91 (2007).

<sup>6</sup> Ibid p. 90.

3. Legislative drafting requires abundance of knowledge of the language, its Grammar, the technical requirements of the form of legislation and perform the task in a non-partisan manner and keeping totally away from political controversies. Once the draft is prepared and forwarded either to the Government or legislative assembly, the draftsman has no control over the draft, in as much as the legislators, consultants and members of the public add much of the inputs by way of additions, modification or even by substitution of several aspects of the draft.

4. Dr. Elmer Driedger's philosophy is very valid in legal writings which enunciates the freedom of draftsman to write the laws, freedom to use the fullest extent which the language permits, not being obstructed by artificial rules or forms and expressed in modern language. Use of ancient, archaic or obsolete terms or forms to be avoided, as a common man or an ordinary individual, may not be able to comprehend what is contained in the draft.

5. Dr. C.K. Allen<sup>7</sup> made an excellent summary of Montesquieu rules on Legislative drafting as contained in his work, "Spirit of laws" (1948). It can be stated thus:-

- (i) Concise and simple style;
- (ii) Terms chosen should be absolute. It should not give rise to differences of opinion;
- (iii) To deal with real and actual matters; hypothetical situation should be avoided;
- (iv) Simple reasoning of an average man to be adopted;
- (v) No confusion should be created in the main issues dealt with, by a number of exceptions, limitations or modifications;
- (vi) The provisions should not be argumentative – Avoidance of detailed reasons being given, as they would give rise to controversies; and
- (vii) Maturely considered as of practical utility.

6. C.K. Allen states that no perfect draft is possible, and it is only an ideal. He expressed this in the following words:

"To demand perfection of expression and sense is to expect infallibility, not only of human foresight but also of human language, and the fact that it is unattainable is one of the serious draw-backs of Statute Law"<sup>8</sup>

However, the draftsman should make efforts to reduce doubts, ambiguities and mistakes to a workable minimum.

7. An Indian Legislative draftsman additionally requires the following:<sup>9</sup>

- (i) An intimate and full knowledge of the Indian Statute book;
- (ii) Familiarity with legal principles as expounded by the Courts;
- (iii) A full and intimate knowledge of the Constitution, particularly fundamental Rights and provisions relating to distribution of legislative powers between the Centre and the State; and
- (iv) Knowledge of procedure in Parliament or Legislative Assemblies, administration, Courts at work including societal living conditions.

<sup>7</sup> Dr. C.K. Allen, 'Law in the making' 484 (1964).

<sup>8</sup> Dr. C.K. Allen, 'Law in the making' 484 (1964).

<sup>9</sup> Bharat Bhushan v. P.C. Saxena AIR 1955 All p. 82. See also "The drafting of laws" – Indian Law Institute, p. 32 (1980). Upto date case laws, with their application is most needed.

8. Draftsman should be aware of the rules of interpretation adopted by the Courts. In the Indian content, how the Judiciary is finally looks at the legislative work becomes very crucial. If the draft is not expressed in simple language, it is a matter of Judiciary to interpret and a draftsman cannot be sure whether the Court comes to his rescue or not. As the Supreme Court has ruled: "lack of Legislative simplicity has led to interpretative complexity"<sup>10</sup> only in rare cases, the Courts adopt a favourable construction of the Statute<sup>11</sup>. In other cases, Courts could not help and left the matters to the legislatures to rectify the draft.

9. Despite the fact that the draftsman has taken all the possible care to attain success in his efforts, he has been criticized for having produced half the litigation.<sup>12</sup> As most of the legislations affect the ordinary life of citizens from "cradle to grave", citizens are much concerned with these laws and be ready to challenge in Courts, the Constitutional and other legal validity of the laws.

10. It is necessary to have a fair knowledge of the difficulties faced by the draftsman in the performance of his job. As observed by Julius Cohen,<sup>13</sup> the difficulties may be summarized as follows:-

- (i) Pressure for quick decisions;
- (ii) Low level of competence of many legislators;
- (iii) Element of bias and pre-judgment factor of manipulation;
- (iv) Unwillingness of many to recognize the relationship between
- (v) Immediate, volatile emotionalism that often pervades the legislative scene;
- (vi) Allocation of work to various departments

11. In conclusion, the following suggestions are made:

- (i) To relieve the difficulties of the draftsman by giving him enough time to perform his job and also giving him necessary freedom to do it;
- (ii) Legislative drafting is a game of skill<sup>14</sup> and a separate discipline. Continuous training be provided to draftsman;
- (iii) Indian Institute of Legislative Drafting be crated on the analogy of several Institutions established, with branches spread over all the States, to run course on Legislative drafting as well to impart training that is required for draftsman.
- (iv) Since law is an inter-disciplinary subject involving other disciplines, specialized training be given in the area of legislative drafting touching other disciplines;
- (v) The various rules of interpretation and the latest approach by the Courts in evolving new Jurisprudence by precedents, be made known to draftsman, so that the laws drafted may be in conformity with the laws declared by the Courts; and
- (vi) A separate training programme is conducted for legislative Assembly members and parliament, (MLA's & M.P.'s) in the area of Legislative drafting, so that the laws passed may serve the purpose for which they are enacted and stand the test of judicial scrutiny.

<sup>10</sup> Vaswani v. State of West Bengal AIR 1957 SC p. 2476.

<sup>11</sup> Commissioner of Income Tax v. the Elphinstone Spinning & Weaving Mills Co. Ltd., AIR 1060 SC p. 1019 at 1020.

<sup>12</sup> Glanville Williams "The effect of penal legislation in the law of torts" the Modern Law review Vol. 23, 233 (1960).

<sup>13</sup> Julius Cohen, "The Good man and the role of reason in Legislative Law", 41 Cornell law quarterly review 387 (1956).

<sup>14</sup> Thronton, "Legialtive Drafting" Butterworths, London 104 (1979).